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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. 973

GERHARD BRASCH,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent,

HALLINAN, SHAPIRO AND HALLINAN, Attorneys at Law,
VINCENT HALLINAN, Attorney at Law,
CARL B. SHAPIRO, Attorney at Law,
PATRICK SARSFIELD HALLINAN, Attorney at Law,
BRIAN D. ROHAN, Attorney at Law,
Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of the State of California

GERHARD BRASCH,
3035 Gough Street, Apt. 8,
San Francisco, California 94123,
Petitioner in propria persona.

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Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of the State of California

Petitioner prays that a writ of certiorari issue to review the order of the Supreme Court of the State of California entered in the above case on November 16, 1966.

OPINIONS BELOW

The Superior Court, the District Court of Appeal and the Supreme Court of the State of California delivered no opinions.

JURISDICTION

The order of the Supreme Court of the State of California "Petition for hearing DENIED", without opinion, was made and entered on November 16, 1966 and a copy thereof is appended to this petition in the Appendix at page i. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

The respondent court told petitioner in propria persona at the beginning of the first hearing of his complaint for damages for legal malpractice that he could not find an attorney because he had no cause, over-ruled at the next hearing the demurrer of the real parties in interest with time given them to answer, then granted them a further extension of time to answer, and denied, of its own motion, petitioner's requests to enter their default according to law, when they had failed twice to answer within the times allowed, holding, they had filed one day late.

Petitioner claimed in his motion to set aside the denial of his request for entry of default and to enter the default of the real parties in interest that the respondent court denied his right of due process of law by holding that petitioner could not find an attorney because he had no cause and his right of the equal protection of the laws by refusing to enter the default of the real parties in interest, based upon its discriminatory hostility against petitioner because he was not represented by an attorney and its favoritism

for the real parties in interest, both rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. The respondent court denied petitioner's motion, ruling that the Fourteenth Amendment does not apply to petitioner's case.

The District Court of Appeal denied without opinion petitioner's petition for a writ of mandate in which he had claimed denial of his Constitutional rights of due process of law and of the equal protection of the laws by the court below, as explained above.

The Supreme Court of the State of California denied without opinion petitioner's petition for a hearing, in which he had claimed denial of his Constitutional rights of due process of law and of the equal protection of the laws by the respondent court as explained above.

The questions presented are:

1. Whether the respondent court denied petitioner his Constitutional right of due process of law guaranteed by the Fourteenth Amendment by ruling at the very beginning of the first hearing of petitioner's complaint for damages for legal malpractice upon petitioner's pleading to protect his legal rights because he is a layman who could not find an attorney willing to take his case that petitioner could not find an attorney because he had no cause.

2. Whether the respondent court denied petitioner his Constitutional right of the equal protection of the laws guaranteed by the Fourteenth Amendment by denying, of its own motion and contrary to the manda-

tory provisions of sections 586(2) and 585(1)(2) of the California Code of Civil Procedure requiring entry of default, petitioner's two unopposed requests for entry of the default of the real parties in interest, based upon its discriminatory hostility against petitioner because he was not represented by an attorney and its favoritism for the real parties in interest.

FEDERAL CONSTITUTIONAL PROVISIONS AND STATE CODES INVOLVED

The pertinent portions of the Fourteenth Amendment to the Constitution of the United States and of sections 473, 586, 585 and 1054 of the California Code of Civil Procedure are set forth in the Appendix at pages ii-vi.

STATEMENT

Petitioner in propria persona, a layman, filed on March 4, 1966 a complaint for damages for legal malpractice in the amount of $108,206.58 including costs plus interest at the legal rate beginning January 17, 1966 in the respondent court, Proceedings No. 564547, against the real parties in interest named in the caption for the following reasons.

The real parties in interest had accepted petitioner's original action, filed by him in propria persona in the Municipal Court of the City and County of San Francisco, California, after one of the defendants in that action had filed a demurrer. Petitioner gave them his

litigation papers and written information and paid the requested fee in advance for amending his complaint. They did not amend it, and they did not transfer his complaint to the Superior Court, as he had instructed them, since he had discovered in the meantime that he was entitled to damages in excess of $5,000.00. On November 20, 1964 a Judgment of Dismissal with Prejudice was entered against petitioner upon ex parte motion of one of the defendants. Petitioner, again in propria persona, claimed in his appeal from this Judgment damages in the amount of $107,406.89. His appeal and petitions for review of this Judgment were denied; the last of his motions on January 17, 1966. The real parties in interest returned to petitioner his papers and their fee after the entry of the Judgment of Dismissal with Prejudice.

The real parties in interest demurred that petitioner had filed his action too late. On March 17, 1966 the Presiding Judge of the Superior Court granted petitioner an extension of time up to and including April 13, 1966 for answering the demurrer and ordered that the demurrer should be heard on a day following April 13, 1966. On April 8, 1966 petitioner filed his answering brief.

On April 13, 1966 petitioner discovered that the respondent court had scheduled a hearing on the demurrer for the same day. He appeared and immediately at the very beginning of the hearing asked the respondent court to protect his legal rights since he is a layman who could not find an attorney willing to take his case. The respondent court told him that all

people are equal before the law, that the court could not write the pleadings of a party, and that he could not find an attorney because he had no cause. The hearing on the demurrer was continued to July 8, 1966 in order to wait for the decision in a pending action before the California State Supreme Court whether the statute of limitations applying to legal malpractice is one year or two years. There is no transcript of the hearing on the demurrer.

Petitioner wrote in his Amendment to Plaintiff's Answering Brief of May 12, 1966 that the California State Supreme Court held that the statute of limitations governing damage actions for legal malpractice is two years and that he had filed his complaint timely.

On May 23, 1966 petitioner mentioned in his brief entitled "Objections and Taking Exceptions" that he had received no notice that a hearing of his case had been scheduled for April 13, 1966, and he specifically claimed denial of his Constitutional right of due process of law guaranteed by the Fourteenth Amendment by the respondent court as follows:

> "In the beginning of the hearing the Court told plaintiff that he could not find an attorney willing to take his case because he had no cause. Plaintiff pleads that this statement made by the Court in the beginning of the hearing is prejudicial to his cause in that it is a determination of the merits of his cause based upon an extraneous matter, namely, the fact that he could not find an attorney willing to take his case and not upon his pleading that he has a good cause for the following reasons: . . .

> Plaintiff pleads that the above statement by the Court made in the beginning of the hearing deprives him of his right to due process of law guaranteed by the provision of the Fourteenth Amendment to the Constitution of the United States that no State 'shall deprive any person of life, liberty, or property, without due process of law'."

He pleaded furthermore that the remark by the respondent court to counsel for the real parties at the close of this hearing that he did not have to give to petitioner a copy of the expected decision by the California State Supreme Court and that he could get his own copy appeared to be unnecessary and hostile. (Record, Superior Court, Objections and Taking Exceptions, page 1, lines 18-28, line 29 to page 2, line 4, lines 17-30.)

On July 8, 1966 the respondent court overruled the demurrer of the real parties in interest with twenty days given to them to answer. The respondent court did not rule on petitioner's claimed denial of his Constitutional right of due process of law. There is no transcript of this hearing.

The real parties in interest did not answer. On August 1, 1966 petitioner requested entry of default. On August 2, 1966 the respondent court granted them additional time up to and including August 8, 1966 to answer. They filed their answer on August 9, 1966. On August 15, 1966 petitioner filed a second request for entry of default.

At the hearing on petitioner's request for entry of default on August 16, 1966 the respondent court ordered: No Default Entered. The real parties in interest did not appear at this hearing.

In his Motion to set Aside Denial of Plaintiff's Request for Entry of Default and to Enter Default of September 2, 1966 petitioner claimed denial of his Constitutional rights guaranteed by the Fourteenth Amendment

> "upon the grounds that the Court in denying plaintiff's request acted without authority and that this denial deprives him of his rights of due process of law and of the equal protection of the laws guaranteed by the provisions of the Fourteenth Amendment to the Constitution of the United States that 'nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'." (Record, Superior Court, Motion to Set Aside Denial of Plaintiff's Request for Entry of Default and to Enter Default, page 1, lines 21-29.)

Petitioner pleaded that the refusal of the respondent court to enter the default of the real parties in interest was not in accord with the following decisions of the California State Supreme Court:

> " 'Where a demurrer to the complaint has been overruled and the defendant fails to answer within the time granted him, the clerk is authorized to enter his default and judgment for the amount specified in the summons.' Bailey v. Sloan, 65 Cal. 387.

'Where a demurrer has been overruled and time given to answer, but no answer is filed within the time granted by the court to the defendant in which to answer, the clerk is authorized to enter a default judgment without an order of the court.' Wall v. Heald, 95 Cal. 364." (Record, ibid. page 2, lines 16-24.)

"In the hearing on August 16, 1966 on plaintiff's request for entry of default, the Court, denying plaintiff's request, explained that defendants had been one day late in answering and the Court would not strike their answer on that ground; if the Court should enter default, the defendants would ask the Court to set it aside on the grounds of excusable neglect or inadvertence; any court would relieve them of their one day being late because they might plead that their answer was inadvertently filed one day late. However, the defendants had filed no motion in opposition to plaintiff's request for entry of default; they did not appear at the hearing. But, when plaintiff inquired of the Court what motion he should file now, the Court told him that it is improper for the Court to advise him how to try his suit and that a layman would get no greater courtesy than a person represented by an attorney.

'While the court has power to relieve a party from default suffered through inadvertence, surprise, excusable neglect of mistake, these words are not meaningless, and the party requesting such relief must affirmatively show that the situation clearly falls within such category.' Estate of Wolper, 146 C.A. 2d 249.

Plaintiff pleads that the Court had no authority to deny plaintiff's request for entry of default because the defendants had not asked for such relief that the Court by denying plaintiff's request acted arbitrarily in favor of defendants and against the rightful interests of plaintiff and thus deprived plaintiff of his right of due process of law guaranteed by the provision of the Fourteenth Amendment to the Constitution of the United States that no State shall 'deprive any person of life, liberty, or property without due process of law.'" (Record, ibid., page 2, line 30 to page 3, line 26.)

"In the hearing on August 16, 1966 the Court told plaintiff that a layman gets no greater courtesy than a person represented by an attorney and that it would be improper for the Court to advise plaintiff how to try his lawsuit. But, as plaintiff explained, . . . above, the Court advanced a number of reasons in favor of the defendants in order to have sufficient grounds for denying plaintiff's request for entry of default even though the defendants, four attorneys, had filed no brief in opposition to plaintiff's request for entry of default and had not appeared at the hearing. Plaintiff pleads that these acts show a strong hostility of the Court toward plaintiff because he is a layman who had to appear in propria persona in Court since he could not find an attorney willing to take his case.

But plaintiff's rights, as affected by the denial of his request for entry of default, are no less because he is a layman who could not find an attorney willing to take his case. The Fourteenth Amendment to the Constitution of the United

States provides that no State shall 'deny to any person within its jurisdiction the equal protection of the laws'. This provision is universal in its application 'to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality'. (Yick Wo v. Hopkins, 118 U.S. 356, 369.)

Plaintiff pleads that the denial of his request for entry of default amounts to the practical denial by the Court of that equal protection of the laws which is secured to plaintiff in propria persona as to all other plaintiffs represented by attorneys having business before the Court by the above cited provision of the Fourteenth Amendment to the Constitution of the United States.

Plaintiff prays that the Court upon the grounds set forth above set aside and vacate its order of August 16, 1966 denying plaintiff's request for entry of default and enter the default of the defendants. . . ." (Record, ibid., page 4, line 9 to page 5, line 9.)

At the hearing on September 29, 1966 counsel for the real parties in interest did not oppose petitioner's motion to set aside the denial of petitioner's request for entry of default and to enter default. Petitioner claimed denial of his rights of due process of law and of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States by the respondent court. He claimed that the defendants had not opposed his motion for entry of default and had not appeared at the hearing on his request for entry of default. The respondent

court denied petitioner's motion and passed upon the federal question as follows:

> "And may I make a statement to you, that when you quote the 14th Amendment do not quote it for something that—where it is not applicable.
>
> It is a precious Amendment; equal protection of the law is precious to all loyal Americans, to all of us, don't quote it needlessly. It is sometimes like taking the name of the Lord in vain. I really mean it.
>
> It has nothing to do with the issues of this case. . . . but it shouldn't be used in this situation.
>
> You have filed your papers. I know your contentions. You have not caused the Court to change its decision. And my order therefore must be that your motion to set aside denial of plaintiff's request for entry of default and to enter default is denied." (Record, Superior Court transcript of hearing on September 29, 1966; page 3, lines 8-10; 14-17; 19-20; 22-23; page 4, lines 22-26.)

In his petition for a writ of mandate filed on October 17, 1966 with the District Court of Appeal, First District petitioner prayed that the court may vacate the order of the court below denying his request for entry of default and direct the court to enter the default of the real parties in interest. He pleaded the facts stated above, emphasizing that the respondent court acted without jurisdiction and abused its discretion by denying, of its own motion and without any showing by the real parties in interest of mistake, inadvertence or any other reasons his motion to set aside its order denying entry of default and to enter

default. (Record, District Court of Appeal, petition, page 8, lines 17-24.)

Petitioner claimed denial of his Constitutional right of due process of law by the respondent court as follows:

> "Petitioner pleads that the statement by the court below at the very beginning of the hearing on April 13, 1966 and before submission of arguments that petitioner could not find an attorney because he had no cause is a denial of his right of due process of law guaranteed by the provision of the Fourteenth Amendment to the Constitution of the United States that 'nor shall any State deprive any person of life, liberty, or property, without due process of law' for the following reasons: It is a judicial fiat, taking the place of fact; a creation of a presumption disregarding entirely his pleading that he has a good cause; the connection between the fact proven that he could not find an attorney willing to take his case and that presumed that he has no cause is not sufficient, and reasoning does not lead from one to the other; it is a taking of petitioner's property, his claim against the real parties in interest for legal malpractice in the amount of $108,206.58 and giving it to them without compensation and hearing, that is without due process of law.
>
> Petitioner pleads that the two denials of his requests for entry of default of the real parties in interest of the own motion of the court are not in accord with the decisions of higher courts of the State and are based upon the open hostility of the court against petitioner because he did not employ an attorney, in disregard of his pleading

that he could not find an attorney who would take his case and are thus a denial of his right of the equal protection of the laws guaranteed by the provision of the Fourteenth Amendment to the Constitution of the United States that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' as explained . . . , above.

The real parties in interest did not appear at the hearing on petitioner's request for entry of default on August 16, 1966. The court, by setting forth of its own motion a number of erroneous reasons in favor of the real parties in interest and thus acting as their counsel and against petitioner, denied petitioner's motion for entry of default. But when petitioner asked, 'If I may ask you, your Honor, I am a layman', the court told him, 'You are a layman. I wish to tell you that a layman gets no greater courtesy than a person represented by a lawyer, otherwise people will say, "Why should I have a lawyer?"' " (Transcript, hearing, August 16, 1966, page 3, lines 13-18.)

"The hostility of the Court against petitioner and its endeavors to protect the real parties in interest and to deny his rightful claims are again evident by the holding of the Court in the hearing on September 29, 1966 that 'the law gives the Court the right under a proper showing to set aside--' . . . '--a default--' . . . '--or set aside the denial of plaintiff's request for entry of default, which is the same thing.' Petitioner immediately claimed that the law requires an affirmative showing by the defendants of inadvertence or other reasons (to permit the court to set aside their

default) that they had made no showing and had not even appeared at the prior hearing on petitioner's request for entry of default. (Transcript of hearing on September 29, 1966, page 2, lines 13-26.)—In fact, the defendants did not have to oppose petitioner's motion for entry of default, since the court acted as their counsel, denying petitioner's motion for entry of default and advising him that it is improper for the court to answer his questions. (Transcript of hearing on August 16, 1966, page 3, line 19 to page 4, line 11.)" (Record, District Court of Appeal, petition, page 8, line 25 to page 11, line 4.)

On October 20, 1966 the District Court of Appeal denied petitioner's petition for a writ of mandate without opinion.

On October 31, 1966 petitioner filed a petition for a hearing with the Supreme Court of the State of California in which he pleaded the proceedings in the courts below and claimed that

> "the respondent court, by denying, of its own motion, petitioner's request for entry of default acted contrary to the mandatory provisions of sections 586(2) and 585(1)(2) of the Code of Civil Procedure which require entry of default on petitioner's request and that this decision by the respondent court is not in accord with the holdings of this Court in *Bailey v. Sloan*, 65 Cal. 387 and *Wall v. Heald*, 95 Cal. 364." (Record, Supreme Court, petition for hearing, page 11, lines 3-9.)

Petitioner pleaded that the real parties in interest had not appeared at the hearing on August 16, 1966

on his request for entry of default and had not opposed it. The respondent court, refusing to enter their default, said,

> "I will not do it because if I did I would set it aside. They dated it the 8th—no, counsel, you would be wasting your time. If I entered the default they would come right back and move to set it aside on the grounds of excusable neglect, or inadvertence or neglect. It wouldn't accomplish you anything. We don't do things like that, one day late." (Record, transcript of hearing, August 16, 1966, page 3, lines 5-11.)

Petitioner pleaded that the respondent court by relieving the real parties in interest, of its own motion, of their default acted contrary to the mandatory provisions of section 473 of the Code of Civil Procedure and without jurisdiction, abused its discretion, and that the Court's action is not in accord with the holdings of the California State Supreme Court cited in *Reminders, Inc. v. Superior Court,* 192 C.A. 2d 411, 412-413. (Record, ibid., page 11, line 11 to page 12, line 8.)

Petitioner pleaded that the respondent court told him at the very beginning of the first hearing of his action on April 13, 1966 and before submission of arguments in a rough, unfriendly manner that he could not find an attorney because he had no cause, thus making him feel like an intruder. He pleaded

> "that this statement by the respondent court is the creation of a presumption disregarding entirely his pleading that he has a good cause; it is a judicial fiat taking the place of fact; the

connection between the fact proved that he could not find an attorney willing to take his case and that presumed that he has no cause is not sufficient, and reasoning does not lead from one to the other. *Manley v. Georgia,* 279 U.S. 1, 6, 7. The statement is a taking of petitioner's property, his claim for legal malpractice against the real parties in interest in the amount of $108,206.58 and giving it to them without compensation and hearing, that is without due process. *Chicago, Burlington & Quincy Railroad Company v. City of Chicago,* 166 U.S. 226, 235, 237, 240." (Record, ibid., page 12, line 10 to page 13, line 5.)

Petitioner claimed denial of his Constitutional right of due process of law as follows:

"For these reasons petitioner pleads that this finding by the respondent court that he could not find an attorney willing to take his case because he had no cause is a denial of his right of due process of law guaranteed by the provision of the Fourteenth Amendment to the Constitution of the United States that 'nor shall any State deprive any person of life, liberty, or property, without due process of law'. *Brinkerhoff-Faris v. Hill,* 281 U.S. 673." (Record, ibid., page 13, lines 6-13.)

Petitioner pleaded that the respondent court told him at the very beginning of the first hearing of his complaint on April 13, 1966 that he could not find an attorney because he had no cause and advised opposing counsel that he did not have to give him a copy of the expected decision by the California State Supreme Court and that he could get his own copy, thus showing openly his hostility against him; and furthermore,

that all people are equal before the law, that the court could not write the pleadings of a party, that all people have to write their own pleadings, and that a layman does not receive any more consideration by the court than a person represented by an attorney. However, the respondent court at the hearing on August 16, 1966 after having denied, of its own motion, petitioner's unopposed request for entry of default of the real parties in interest, told him upon his respectful enquiry whether he may submit a question,

> "You are a layman. I wish to tell you that a layman gets no greater courtesy than a person represented by a lawyer, otherwise people will say, 'Why should I have a lawyer?'" (Transcript of hearing on August 16, 1966, page 3, lines 13-18.) "There is nothing that I can tell you. If you want to find out how you get a case set for trial, you will have to go elsewhere, I cannot do that for you, otherwise I would be acting as your advisor." (Ibid., page 4, lines 8-11.) (Record, Supreme Court, petition, page 13, line 15 to page 15, line 6.)

Petitioner claimed denial of his Constitutional right of the equal protection of the laws as follows:

> "Petitioner pleads that the reasons for this unjust and illegal discrimination by the respondent court against petitioner, a party in litigation before a court and material to his rights, and in favor of the real parties in interest are the strong hostility and resentment of the respondent court against petitioner because he did not provide gainful employment to a lawyer even though he had explained to the respondent court that he

could not find an attorney who would take his malpractice action. He pleads that such hostile discrimination in the eye of the law is not justified and illegal and amounts to the practical denial of his right of the equal protection of the laws guaranteed by the provision of the Fourteenth Amendment to the Constitution of the United States that no State shall 'deny to any person, within its jurisdiction, the equal protection of the laws'. *Yick Wo v. Hopkins, Sheriff,* 118 U.S. 356, 369-370, 373-374. *Virginia v. Rives,* 100 U.S. 313, 318. *Truax v. Corrigan,* 257 U.S. 312, 332-333." (Record, Supreme Court, petition, page 15, lines 7-23.)

On November 16, 1966 the California State Supreme Court denied his petition for a hearing without opinion.

REASONS FOR GRANTING THE WRIT

The decree by the Supreme Court of the State of California should be reviewed because it denies, summarily, without opinion, petitioner's claimed rights of due process of law and of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, it is not in accord with applicable decisions of this Court, and petitioner's averments, properly taken below, present substantial Federal questions.

I

At the very beginning of the first hearing of his complaint for legal malpractice petitioner asked the

respondent court to protect his legal rights because he is a layman and no attorney would take his case. The respondent court told him that he could not find an attorney because he had no cause. Petitioner claims that this finding by the respondent court is a prejudgment of his case and a denial of his Constitutional right of due process of law under the Fourteenth Amendment for the reasons stated in the courts below; and it is not in accord with the holding of this Court in *Truax v. Corrigan,* 237 U.S. 312, 332 that

> "the due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon enquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society".

II

On July 8, 1966 the respondent court overruled the demurrer of the real parties in interest with twenty days allowed to them to answer. They failed to answer. On August 1, 1966 petitioner requested entry of default. On August 2, 1966 the respondent court granted them time to answer up to and including August 8, 1966. They filed their answer, a general denial consisting of three sentences, on August 9, 1966. On August 15, 1966 petitioner filed a second request for entry of default.

Section 586 of the California Code of Civil Procedure provides in pertinent part:

> "(Other defaults.) In the following cases the same proceedings must be had, and judgment must be rendered in the same manner, as if the defendant had failed to answer: . . .
>
> 2. If the demurrer to the complaint is overruled . . . , and the defendant fails to answer the complaint within the time allowed by the court;"

a default may be taken.

The term "proceedings" is explained in California Procedure, Witkin, volume 2, page 1694 as follows:

> "Procedure.
>
> (1) Request to Clerk. C.C.P. 585(1) provides for the entry 'upon application of the plaintiff,' and subdivision 2 merely states that the clerk 'must enter' the default. The 'application' is a simple notification or request to the clerk which sets out the facts requiring the entry. (See Owens, pp. 337, 338; 6 Hillyer 5524; cf. Fed. Rule 55(a); 3 B. & H. 44; 5 B. & H. 506.)"

The real parties in interest did not oppose petitioner's motion for entry of default. They did not appear at the hearing on this motion on August 16, 1966. The respondent court, of its own motion denied the request for entry of default, saying,

> "I will not do it because if I did I would set it aside." "You want me to enter a default because they were one day late? By that I would have to strike their answer, and I will not do it. I shall tell you why." "If I entered the default they would come right back and move to set it aside on the grounds of excusable neglect, or inadvertence or neglect,"

the respondent court explained. (Transcript of hearing on August 16, 1966, page 3, lines 5 and 6; lines 20-23; lines 7-9.)

Section 1054 of the Code of Civil Procedure permits the judge of the court to extend the time for filing pleadings; "but such extension so allowed shall not exceed thirty (30) days, without the consent of the adverse party".

August 8, 1966 was the last day of the thirty days extension which the respondent court could grant the real parties in interest for answering petitioner's complaint. They filed their answer consisting of three sentences on August 9, 1966. By denying, of its own motion, petitioner's requests for entry of default the respondent court acted contrary to the mandatory provisions of sections 586(2), 585(1)(2) and 1054 of the Code of Civil Procedure, thus arresting the time for answering and making the quoted laws ineffective.

Section 473 of the Code of Civil Procedure permits the Court to grant a party relief from entry of default or judgment taken if he applies for such relief upon the grounds of mistake, inadvertence, surprise or excusable neglect, within six months after such judgment, order or proceeding was taken. The real parties in interest had twice failed to answer within the time allowed; they did not oppose petitioner's motion for entry of their default; they did not appear at the hearing on this motion; and they did not ask to be relieved of their default. Therefore, section 473 does not apply to their two defaults, contrary to the

holding by the respondent court, as the following decision points out:

> [1] "Judgments—Opening and Vacating—Excusable Neglect.—The condition or situation which Code Civ. Proc. § 473 seeks to remedy is one in which a party to a cause is unexpectedly placed to his injury without any fault or negligence of his own which ordinary prudence could not have guarded against, but only such inadvertence or negligence as may reasonably be characterized as excusable warrants relief. . . .
>
> [4] Judgments—Opening and Vacating—Inexcusable Neglect.—It is not the purpose of Code Civ. Proc. § 473, to permit the setting aside of judgments that are the result of inexcusable neglect of the parties, or their attorneys in the performance of their obligations to their clients." *Hummel v. Hummel,* 161 CA 2d 272-273.

The reasons which the respondent court gave for denying petitioner's request for entry of default are proof that the respondent court had full knowledge and understanding of the mandatory provisions of the above quoted laws, but nevertheless, upon its own motion and contrary to their mandatory provisions, denied petitioner's requests for entry of default and thus acted in favor of the real parties in interest and with purposeful, discriminatory hostility against petitioner because he is a layman who did not engage the services of an attorney, even though he had explained several times to the respondent court that no attorney would take his action for legal malpractice. However, when petitioner moved for entry of default,

he was in the same position and had the same rights as any other plaintiff in the State moving for entry of default. The denial of his request for entry of default is therefore an unlawful administration of sections 586(2) and 585(1)(2) of the California Code of Civil Procedure, a denial of his Constitutional right of the equal protection of the laws guaranteed by the Fourteenth Amendment, and the order of the court below denying his request for entry of default is not in accord with the following holdings of this Court:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibitions of the Constitution." *Yick Wo v. Hopkins, Sheriff,* 118 U.S. 356, 373-374.

> "It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all actions of the State denying equal protection of the laws whether it be action of one of these agencies or by another." *Virginia v. Rives,* 100 U.S. 313, 318.

III

Petitioner claimed that the respondent court denied his Constitutional rights of due process of law and of the equal protection of the laws, both guaranteed by the Fourteenth Amendment. This Court said in *Zucht*

v. King, 260 U.S. 174, 177 that such "averments do present a substantial constitutional question" and in the following decisions that this Court will review them if effectively claimed in the courts below.

> "Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made." *Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc.,* 312 U.S. 287, 293.
>
> "Denial of equal rights in the action of the judicial tribunals of the State are left to the revisory power of this Court." *Virginia v. Rives,* 100 U.S. 313, 322.
>
> "This Court will review the finding of facts by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; . . ." *Fiske v. Kansas,* 274 U.S. 380.
>
> "The due process of law clause in the Fourteenth Amendment . . ." requires "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land'." *Herbert et al. v. Louisiana,* 272 U.S. 312-313.
>
> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler,* 263 U.S. 22, 24.

> In *Neal v. Delaware,* 103 U.S. 370 this Court held the exclusion, because of their race and color, of citizens from jury service by the jury commissioners, if made without authority derived from the Constitution and laws of the State, a violation of the prisoner's rights, under the Constitution and laws of the United States, which the trial court was bound to redress; "and the remedy for any failure in that respect is ultimately in this court upon writ of error."

The denial of petitioner's petition for a hearing by the court below and thus affirming the denial of petitioner's request for entry of default by the trial court is a denial of petitioner's claimed Constitutional rights, and it is not in accord with the above quoted decisions of this Court, in which this Court affirmed these rights and stated that this Court will review their denial "in the action of the judicial tribunals of the State". *Virginia v. Rives,* 100 U.S. 313, 322.

Petitioner respectfully submits that the special and important reasons for the exercise of this Court's discretionary jurisdiction for review of his petition on writ of certiorari, stated in Rule 19 of the Rules of this Court, are given and that this Court may reverse the decree of the Supreme Court of the State of California and remit the case with instructions to reverse the denial of petitioner's request for entry of default by the respondent Superior Court of the City and County of San Francisco.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
January 12, 1967.

GERHARD BRASCH,
Petitioner in propria persona.

(Appendix Follows)

Appendix

Order Due
November 18, 1966

In the Supreme Court
of the
State of California

In Bank

Brasch
vs.
The Superior Court of the City and County of San Francisco

ORDER DENYING HEARING
After Judgment by Court of Appeal
1st District, Division 3, Civil No. 24029

Petition for hearing DENIED.

Traynor
Chief Justice

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 22nd day of November, A.D. 1966.

William I. Sullivan, Clerk
By K. M. Hawkes, Deputy Clerk

Filed November 16, 1966,
William I. Sullivan, Clerk,
by J. M. R., S. F. Deputy.

CONSTITUTION OF THE UNITED STATES

Amendment XIV. Section 1. . . .; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 473. (Pleadings may be amended: Continuance: Relief from judgment taken by mistake, inadvertence, surprise, or excusable neglect: Correction of clerical mistakes in judgments or orders: Setting aside void judgment or order.) . . .

(Relief from judgment taken by mistake, inadvertence, surprise, or excusable neglect.) The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken. . . .

§ 586. (Other defaults.) In the following cases the same *proceedings* must be had, and judgment must be rendered in the same manner, as if the defendant had failed to answer:

1. If the complaint has been amended, and the defendant fails to answer it, as amended, or demur thereto, or file a notice of motion to strike, of the character specified in Section 585, within 10 days after service thereof or within the time allowed by the court;

2. If the demurrer to the complaint is overruled and a motion to strike, of the character specified in Section 585, is denied, or where only one thereof is filed, if the demurrer is overruled or the motion to strike is denied, and the defendant fails to answer the complaint within the time allowed by the court; . . .

§ 585. (Default judgment.) Judgment may be had, if the defendant fails to answer the complaint, as follows:

1. In an action arising upon contract for the recovery of money or damages only, if the defendant has, or if more than one defendant, if any of said defendants have, been personally served and no answer or demurrer or notice of motion to strike (of the character hereinafter specified) or notice of motion to quash service of summons pursuant to Section 416.1 of this code or notice of the filing of a petition for writ of mandate as provided in Section 416.3 of this code has been filed with the clerk or judge of the court within the time specified in the summons, or such further time as may be allowed, the clerk, or the judge if there be no clerk, *upon application of the plaintiff,* and proof of such service of summons, must enter the default of the defendant or defendants, so served, and immediately there-

after enter judgment for the principal amount demanded in the complaint or a lesser amount if credit has been acknowledged, together with interest allowed by law or in accordance with the terms of the contract, and the costs against said defendant, or defendants, or against one or more of said defendants. If, by rule of court, a schedule of attorney fees to be allowed has been adopted, the clerk may include in the judgment an attorney fee in accordance with such schedule if the contract provides that an attorney fee be allowed in the event of an action thereon; provided, that plaintiff shall have the right, upon filing a written request at the time of application for entry of the default of the defendant or defendants, to have the attorney fee fixed by the court, whereupon, after the entry of said default, the court shall hear the application for determination of the attorney fee and render judgment for the same and for the other relief demanded in the complaint, or a lesser amount if credit has been acknowledged, and the costs against said defendant, or defendants, or against one or more of said defendants.

2. In other actions, if the defendant has been personally served and no answer or demurrer or notice of motion to strike (of the character hereinafter specified) or notice of motion to quash service of summons pursuant to Section 416.1 of this code or notice of the filing of a petition for writ of mandate as provided in Section 416.3 of this code has been filed with the clerk or judge of the court within the time specified in the summons, or such further time as may be allowed, the clerk, in courts having a clerk, *must enter* the default of the defendant; and thereafter the

plaintiff may apply to the court for the relief demanded in the complaint; in courts which have no clerk, the court must hear the evidence offered by the plaintiff, and must render judgment in his favor for such sum (not exceeding the amount stated in the complaint), as appears by such evidence to be just. If the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if, to determine the amount of damages, the examination of a long account is involved, by a reference as above provided. (Emphasis added.) . . .

§ 1054. (Extension of time: By judge or by stipulation.) When an act to be done, as provided in this code, relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparation of bills of exceptions, or of amendments thereto, or to the service of notices other than of appeal and of intention to move for a new trial, the time allowed therefor, unless otherwise expressly provided, may be extended, upon good cause shown, by the judge of the court in which the action is pending, or by the judge who presided at the trial of said action; but such extension so allowed shall not exceed thirty (30) days, without the consent of the adverse party.

In all cases in which the court or judge is authorized by this section to grant an extension of time, such extension of time shall be granted when all attorneys of record of parties who have appeared in the action agree in writing to such extension of time, and any extension of time previously granted by stipulation of all attorneys of record of parties who have appeared in the action shall not be included in the computation of the 30-day limitation upon extensions of time allowed by the court or judge.

Remainders, Inc. v. Superior Court, 192 C.A. 2d 411 at p. 412, 13 Cal. Rptr. 221:

(3) While a defendant has the right to be relieved of his default if he applies for such relief upon the grounds set forth in section 473, Code of Civil Procedure, the court cannot of its own motion grant a defendant relief from his default for failure to answer a complaint, as its jurisdiction so to do is dependent upon an application for such relief being made by the defendant and a showing made of mistake, inadvertence, surprise or excusable neglect. (*McDonald v. Severy,* 6 Cal. 2d 629 [59 P.2d 98]; *Osmont v. All Persons,* 165 Cal. 587, 590 [133 P. 480]; *Suttman v. Superior Court,* 174 Cal. 243 [162 P. 1032]; *Estate of Hultin,* 29 Cal.2d 825, 829-830 [178 P.2d 756].)

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. 973

GERHARD BRASCH,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR REHEARING

GERHARD BRASCH,
3035 Gough Street, Apt. 8,
San Francisco, California 94123,
Petitioner in Propria Persona.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

In the Supreme Court

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SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR REHEARING

Petitioner presents his petition for a rehearing of this Court's order dated February 27, 1967, denying the petition for a writ of certiorari to the Supreme Court of the State of California, and, in support thereof, respectfully shows:

REASONS FOR GRANTING REHEARING

The Court of Appeal of California, the Supreme Court of California and this Court have all denied petitioner an appellate hearing without opinions.

Thus the rights of a litigant who appears in court without counsel in a civil case, either because he is poor, or as in this case, because he cannot find counsel

to represent him in his case for legal malpractice, are left unanswered.

I.

In the case at bar petitioner requested entry of default judgment under the mandatory provisions of sections 586 and 585(1)(2) of the California Code of Civil Procedure, and the respondent court denied his unopposed request solely on the ground that petitioner was unrepresented by counsel. The respondent court stated that the mere fact that petitioner was unable to obtain counsel indicated that his case was without merit. The respondent court further held that if default was entered it would be set aside later.

It is petitioner's contention that this holding in effect was a denial of his Constitutional right of the equal protection of the laws under the Fourteenth Amendment since it divided plaintiffs requesting entry of default according to law into two classes: one represented by counsel whose requests for entry of default are granted and one appearing in propria persona whose requests for entry of default are denied, thus making arbitrary and unjust discriminations, founded on difference of representation between persons otherwise in similar circumstances, material to their rights, in violation of the prohibition of the Fourteenth Amendment and in direct conflict with the principles established by this Court in *Yick Wo v. Hopkins, Sheriff,* 118 U.S. 356, 373-374 and in *Virginia v. Rives,* 100 U.S. 313, 318.

The effect of the decree of the court below, if unreversed, is a permission for the State trial courts to

deny arbitrarily, rights which State law confers on all litigants to those who are not represented by attorneys if the opposing parties are represented by attorneys. The seriousness of this complete departure by the court below from the principles established by this Court more that eighty years ago, affirming the equal protection of the laws, upon the rights of other litigants without counsel, makes this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

II.

The trial court's denial of petitioner's request to enter default against the real parties in interest on the ground that petitioner was not represented by counsel, when said court would have entered default if petitioner had been represented by counsel, since the law requires entry of default upon request, was a denial of petitioner's Constitutional right of due process under the Fourteenth Amendment. The fact that petitioner had no counsel representing him was not a matter to be considered by the respondent court on a request for entry of default under sections 586 and 585(1)(2) of the California Code of Civil Procedure.

The decree of the court below, denying petitioner a hearing, is thus a sanction of the purely arbitrary and capricious denial of petitioner's request for entry of default by the respondent court and a general permission for the State trial courts to deny other unrepresented plaintiffs due process if the opposing parties are represented by counsel; and it is in conflict with

the principles established by this Court in *Truax v. Corrigan,* 237 U.S. 312, 332.

III.

All the courts below gave no reasons for denying petitioner's petitions in which he had claimed that the denial of his request for entry of default by the respondent court was a denial of his Constitutional rights of due process of law and of the equal protection of the laws under the Fourteenth Amendment. The real parties in interest did not oppose petitioner's requests for entry of default; his petition for a writ of mandate with the District Court of Appeal to compel the respondent court to enter their default according to law; his petition for a hearing with the court below; and his petition for a writ of certiorari with this Court.

For these reasons, the decree of the court below, without opinion, is in conflict with the decision of this Court in *Chapman v. State of California* of February 20, 1967 because this Court held in part III of this decision that the beneficiary of the error complained of must prove that there was no injury or suffer a reversal of his erroneously obtained judgment and "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt".

The decree of the court below, if unreversed, means that in future cases litigants in propria will no longer stand equally with litigants represented by attorneys before the laws of the State of California and that

State court actions in such cases is immunized from the operations of the equal protection of the laws of the Fourteenth Amendment because the act is that of the judicial branch of the State of California.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of the State of California.

Dated, San Francisco, California,
March 14, 1967.

Respectfully submitted,
GERHARD BRASCH,
Petitioner in Propria Persona.

CERTIFICATE OF PETITIONER

I, Gerhard Brasch, petitioner in propria persona, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of the Court.

Dated, San Francisco, California,
March 14, 1967.

GERHARD BRASCH,
Petitioner in propria persona.